THE RESERVE BANK OF ZIMBABWE
versus
ALLIED BANK LIMITED
and
UNILIVER SOUTH EAST AFRICA PENSION FUND
and
MESSENGER OF COURT, HARARE

HIGH COURT OF ZIMBABWE
CHATUKUTAJ
HARARE, 21 January, 2015

Urgent Chamber Application

Makori & T.A Chiurayi, for the applicant
W. Madera, for the first respondent
Ms *R. Magundani*, for the 3rd respondent

CHATUKUTAJ: The first respondent was a duly registered commercial bank prior to 6 January 2015. It surrendered its banking licence to the applicant on 6 January 2015 as a result of capitalisation challenges. On 9 January 2015, the applicant petitioned the High Court in case No HC 180/15 for the liquidation of the first respondent. The applicant issued a press statement in various newspapers advising the public of the fact that the first respondent had surrendered its licence and of its intention to wind up the first respondent.

Prior to the above events, the second respondent had obtained an order against the first respondent in case number HC 27484/14. On 10 January 2015, after the press release by the applicant and the filing of HC 180/15, the second respondent instructed the third respondent to proceed with the execution of the order in HC 27484/14. At the same time, it signed a bond of indemnity in favour of the third respondent. On 12 January 2015, the third respondent proceeded to evict the first respondent from its premises at Travel Plaza and attached various movables.

When the applicant became aware that execution had commenced, it wrote to the third respondent on 12 January 2015 advising him of the petition to liquidate the first respondent. The letter set out the provisions of the Companies Act [*Chapter* 24:20] and in particular ss

210 and 213. It further set out the import of the provisions that the filing of a petition for liquidation stays any legal proceedings against the company being wound up.

In addition to the letter, Mr *Chiurayi* communicated telephonically with Mr. Smart Moyo., the Messenger of Court, Harare, confirming the contents of the latter. It was averred by Mr *Chiurayi* in the founding affidavit, which averment was not controverted, that Mr Moyo indicated that he would proceed with the execution in the absence of a court order directing him to cease execution.

It is this response that caused the applicant to seek an order directing the third respondent to desist from proceeding with the execution.

The parties first appeared before me on 15 January 2015. Initially, Ms *Magundani* submitted that the third respondent would only be prevented from proceeding to execute by an order of this court. She however abandoned this argument and all the parties agreed to the court granting a final order. Ms *Magundani*, submitted that as the messenger of court was executing an order of court there was no basis for the court to make an award for costs against him. She further submitted that she did not instruction to consent to any order for costs against the third respondent.

The only outstanding issue which gave rise to another hearing (now on 20 January 2015) is therefore the question of costs in view of the fact that all the parties were consenting to the court granting a final order.

Mr *Makori* submitted that the applicant had been placed out of pocket by the unreasonable refusal of the third respondent to cease execution despite the letter of 12 January 2015 and the telephone conversation of the same day between Mr *Chiurayi* and Mr Smart Moyo. It was further submitted that the applicant's representative who was present during the ejectment of the first respondent also showed the third respondent a copy of the application.

Ms *Magundani* submitted that the third respondent only became aware of the court application in HC 180/15 formally and in terms of the rules, on 13 January 2015 when the application was served on the respondent.

I am inclined to agree with Ms *Magundani* that, the third respondent, as an officer of the court, is only mandated (generally) to act on the strength of a court order. An exception to this general rule is as in the present case where an act of Parliament specifically precludes him from exercising that mandate. The messenger of court cannot be expected to act on the say so of one of the parties, either verbally or in writing. (see *Dlodlo* v *Deputy Sheriff Marondera*

2011 (1) ZLR 416 @ 418 H-419D.)

However, the matter does not end here. It is common cause that the third respondent was served with the court application on 13 January 2015. He had, in my view, the prior wise counsel of the applicant's legal practitioner on the effect of the application and the need to desist from proceeding with the execution. He however, indicated that he would not stop the execution unless he was availed a court order directing him to stop.

The third respondent's position that only a court order would prevent him from proceeding with the execution is buttressed in two respects. Firstly, initial submissions for the third respondent made on 15 January 2015 were to the same effect.

Secondly, the third respondent wrote a letter on 15 January 2015 to the applicant's counsel confirming the contents of the letter of 12 January 2015. The letter reads as follows:

> "*We refer to your letter dated 06th January 2015, in respect of the above matter.*
>
> *The contents have been noted.*
>
> *We suggest you write* ***DIRECT*** *(sic) to the instructing lawyers Messrs Mambosasa Legal Practitioners.*
>
> *Please note that the Office Messenger of Court (sic) has a mandate to execute all court documents."*

The third respondent's letter, though of 15 January 2015, is important in that the respondent was acknowledging the contents of the applicant's letter of 12 January 2015. The contents as alluded earlier indicated the reasons why the third respondent should have halted the execution. Despite the applicant's letter being specifically directed at him the third respondent was of the view that the proper person that the applicant should have contracted was the second respondent's legal practitioners. In fact emphasis was placed on the word "direct" to reflect that the third respondent had nothing to do with the contents of the letter whether or not he was being told that he was precluded by an Act of Parliament from proceeding with the execution.

As a parting shot, the third respondent reminded the applicant's legal practitioners of his mandate to comply with court orders and nothing else. This was so despite the fact that as of the date of his letter, he had not only been served with the petition in HC 180/15, but with the present court application.

Mambosasa Legal Practitioners had in fact communicated with the third respondent

instructing him to release documents (presumably attached during the execution) to the applicant's representatives who were at the first respondent's offices. In an email dated 12 January 2015 and at 1641hours, Mr Shomwe of Mambosasa Legal Practitioners observed as follows:

> "2. *We are however agreeable to yourselves or the RBZ taking possession of all the documents at the branch.* ***In actual fact, I have personally instructed the Messenger of Court to release all documents to the RBZ officials who were at the scene.*** *A certain Mr Dendere is in possession of those documents as I write.*
>
> *3. We are also agreeable to releasing any other documentation or thing (sic) which your offices or RBZ may require." (own emphasis).*

It is therefore surprising that the third respondent was directing the applicant's legal practitioners to contact Mambosasa Legal Practitioners when Mr Shomwe had already contacted him and given him instructions following the applicant's letter.

It is therefore no surprise that the applicant found itself here in court to protect the interests of the first respondent's depositors and creditors as it is mandated to do. Had the third respondent taken heed of the provisions in the letter of 12 January 2015 and the court application in HC 180/15, and further the court's observations on 15 January 2015, the matter would not have proceeded this far. It is my view that the third respondent did not exercise diligence and acted unreasonably for an officer of the court.

Regarding the question of costs, it appears both parties had agreed to an order for ordinary costs prior to the hearing.

In the result the draft consent order is granted with costs.

Coghlan, Welsh & Guest, applicant's legal practitioners
Mambosasa Legal Practitioners, 2nd respondent's legal practitioners
Scanlen& Holderness, 3rd respondent's legal practitioners